STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DAVID SEAL, BRANDON SEAL, BRITNEY MILLER, DAVID MILLER, and ALEXIS MILLER, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SHERRY COWAN,

Respondent-Appellant,

and

DAVID MILLER,

Respondent.

UNPUBLISHED
January 24, 2006

No. 263383
Genesee Circuit Court
Family Division
LC No. 03-116682-NA

In the Matter of BRITNEY MILLER, DAVID MILLER and ALEXIS MILLER, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DAVID MILLER,

Respondent-Appellant,

and

SHERRY COWAN,

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No. 263384
Genesee Circuit Court
Family Division
LC No. 03-116682-NA

In the Matter of DAVID SEAL and BRANDON SEAL, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

EARL D. SEAL,

Respondent-Appellant,

and

SHERRY COWAN,

Respondent.

No. 263871
Genesee Circuit Court
Family Division
LC No. 03-116682-NA

Before: Sawyer, P.J., and Wilder and H. Hood[*], JJ.

PER CURIUM.

In these consolidated appeals, respondents Sherry Cowan, David Miller, and Earl Seal appeal as of right from the trial court's orders terminating their parental rights to the minor children. The court terminated the parental rights of respondents Cowan and Miller pursuant to MCL 712A.19b(3)(c)(i), (g), and (j),[1] and terminated the parental rights of respondent Seal pursuant to MCL 712A.19b(3)(a)(ii) and (h). We affirm.

Respondent Cowan is the mother of all five children. Respondent Seal is the father of David and Brandon Seal, and respondent Miller is the father of Britney, David, and Alexis Miller. The court assumed jurisdiction over the children in 2003, principally because of issues involving environmental and medical neglect. At that time, the children were living with respondents Cowan and Miller, and respondent Seal was incarcerated.

[*] Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

[1] Contrary to what respondent Miller asserts, there is no indication in the record that the trial court also terminated his parental rights under § 19b(3)(c)(ii).

Respondents Cowan and Miller both argue that the trial court erred in finding that a statutory ground for termination was established by clear and convincing evidence. We disagree.

This Court reviews a trial court's findings of fact in a parental termination case under the clearly erroneous standard. MCR 3.977(J). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The burden of proof is on the petitioner to establish a statutory ground for termination by clear and convincing evidence. *In re Trejo Minors*, 462 Mich 341, 350; 612 NW2d 407 (2000).

In terminating the parental rights of respondents Cowan and Miller, the trial court relied on §§ 19b(3)(c)(i), (g) and (j), which authorize a court to terminate a respondent's parental rights under the following circumstances:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
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> (i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

There was clear and convincing evidence to support the trial court's decision with respect to each of the statutory grounds. Respondents Cowan and Miller both failed to complete the requirements of their parent-agency agreement, and neither made substantial progress in rectifying the underlying conditions that led to the court's assumption of jurisdiction. A parent's failure to comply with a parent-agency agreement is evidence of the parent's failure to provide proper care and custody of the child. *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003). The evidence also demonstrated that neither of these respondents could properly care for the children without the assistance of outside help, and that outside assistance would be required possibly on a daily basis, for several years. Thus, there was no reasonable expectation that either respondent would be able to properly care for the children on their own within a reasonable time, given the children's ages.

Respondents Cowan and Miller also both argue that petitioner failed to make reasonable efforts to reunite them with their children because petitioner did not accommodate their disabilities. The evidence demonstrated that respondents Cowan and Miller both had intellectual limitations. During the pendency of this case, respondents Cowan and Miller argued that petitioner was required to accommodate their disabilities under the Americans With Disabilities Act (ADA), 42 USC 12101 *et seq.*

We agree that failure to accommodate respondents' disabilities could provide a basis for the trial court to find that reasonable efforts were not made to reunite the family. *In re Terry*, 240 Mich App 14, 24-26; 610 NW2d 563 (2000). Here, however, respondent Cowan was evaluated by a program through Community Mental Health for additional services that might be available to her. On the basis of her evaluation, she only qualified for counseling, but she failed to complete any counseling. Respondent Miller did not complete the evaluation, thereby precluding a determination whether he qualified for additional services. Respondents Cowan and Miller were also both evaluated at the University of Michigan Center for the Child and Family to assess their cognitive limitations and skills. Furthermore, respondents Miller and Cowan both received the assistance of a parent aid for approximately five months. The parent aid worked with them in their home and assisted them in completing the requirements of their parent-agency agreements.

On this record, we conclude that petitioner made reasonable efforts to reunite the family. Petitioner investigated whether additional services could be offered to assist both respondent Cowan and respondent Miller. Both respondents failed to fully participate in the services offered. We also find no merit to respondent Cowan's argument that she should have received the assistance of the parent aid for more than five months. Although respondent Cowan made some progress during the time period she was assisted by the parent aid, it was clear that further assistance would not have been enough to rectify the conditions in this case, particularly when respondent Cowan refused to participate in counseling.

For these reasons, we reject respondents Cowan's and Miller's claims that petitioner failed to make reasonable efforts to reunite them with their children.

Respondents Miller and Cowan also both argue that the trial court clearly erred in its consideration of the children's best interests. Once the petitioner proves a statutory basis for termination by clear and convincing evidence, "the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo, supra* at 354; MCL 712A.19b(5). The court's best interest decision is also reviewed for clear error. *In re Trejo, supra* at 356-357.

We find no merit to respondent Cowan's argument that the trial court improperly shifted the burden of proof on this issue. The trial court properly decided the best interest question based on all the evidence of record. *Id.* at 352-354. The court never suggested that it was ruling against respondent Cowan because she did not prove that termination of her parental rights was not in the children's best interests.

We agree with the trial court that the evidence failed to clearly show that termination of respondent Cowan's and respondent Miller's parental rights was not in the children's best

interests. The children had made substantial progress while in foster care and there was a significant risk that they would regress and face future neglect if they were returned to respondents' custody. The trial court did not clearly err in its consideration of the children's best interests.

Respondent Seal first argues that the trial court's findings of fact and conclusions of law were inadequate to satisfy MCR 3.977(H)(1). We disagree. Although the trial court's findings of fact were brief, they were definite and pertinent and, therefore, were sufficient to satisfy MCR 3.977(H)(1).

Respondent Seal also argues that the trial court clearly erred in finding that §§ 19b(3)(a)(ii) or (h) were established by clear and convincing evidence. Those sections authorize a court to terminate a respondent's parental rights under the following circumstances:

> (a) The child has been deserted under any of the following circumstances:
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> * * *
>
> (ii) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.
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> * * *
>
> (h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

Respondent Seal argues that petitioner failed to establish that he would be imprisoned for such a period that his children would be deprived of a normal home for a period exceeding two years as required by § 19b(3)(h). Because respondent Seal was not subject to an adjudication, petitioner was required to establish this statutory ground for termination by legally admissible evidence. *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002); MCR 3.977(E)(3).

Respondent Seal argues that petitioner improperly relied on hearsay evidence to prove that he would be incarcerated until September 2006. The record demonstrates that the caseworker relied on records from the Department of Corrections to conclude that respondent Seal's latest release date from prison was in September 2006. Such records would have been admissible under MRE 803(8), the hearsay exception for public records and reports. See *People v Monaco*, 262 Mich App 596, 610; 686 NW2d 790 (2004). Although respondent Seal's attorney did not object to the testimony, it is apparent that an objection would have been futile because the evidence would have been admissible under MRE 803(8). *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). For these reasons, this unpreserved issue does not require reversal, and further, trial counsel was not ineffective for failing to object.

Furthermore, the trial court did not clearly err in finding that § 19b(3)(h) was established by clear and convincing evidence. At the time the termination petition was filed in June 2004, respondent Seal was facing imprisonment for more than two years, until September 2006. Although he asserts on appeal that he may be released earlier, there was no evidence offered to suggest this at the termination hearing. In fact, the evidence indicated that respondent Seal was released on parole in 2003, but violated his parole shortly after he was released and returned to prison. The caseworker also testified that no arrangements had been made for the children's care while respondent Seal was incarcerated. Accordingly, there was clear and convincing evidence to terminate his parental rights under § 19b(3)(h). Because only a single statutory ground is required to terminate parental rights, *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991), we need not decide whether termination of respondent Seal's parental rights was also warranted under § 19b(3)(a)(ii).

Respondent Seal also argues that his trial attorney was ineffective. Because respondent Seal did not raise this issue in an appropriate motion in the trial court, our review is limited to errors apparent from the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

In order for this Court to reverse due to ineffective assistance of counsel, respondent Seal must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied the right to a fair trial. *Pickens*, *supra*. He must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, he must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Most of respondent Seal's arguments involve his attorney's alleged failure to properly or thoroughly question witnesses at the termination hearing. Decisions regarding what evidence to present and whether to call or question witnesses are all matters of trial strategy which this Court will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Here, it is not apparent from the available record that counsel was ineffective in his strategic decisions concerning whether and how to question the witnesses. Accordingly, respondent Seal has not established ineffective assistance of counsel on this basis.

Respondent Seal also argues that his attorney should have presented evidence that he may be released from prison before September 2006. Respondent Seal improperly relies on evidence that was not presented below, and on events that occurred after the termination hearing, to support this argument. Counsel cannot be found ineffective on the basis of events that occurred after the termination hearing concluded.

We also reject respondent Seal's argument that counsel improperly engaged in an on-the-record conversation with respondent. The conversation did not involve any confidential matters and its purpose was merely to inform respondent, who was participating at the trial via a telephone hookup, of events that occurred in his absence, which did not involve him. Counsel advised respondent Seal that they could speak in private if there were any matters that respondent Seal wanted to discuss with counsel. Respondent Seal indicated that there was

nothing to discuss. On this record, there is no basis for concluding that trial counsel was ineffective.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood